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Opinion Committee

July 28, 1994

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Honorable Dan Morales
Attorney General of Texas
Supreme Court Building
P.O. Box 12548
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Attention: Ms. Sarah J. Shirley, Chair
Opinion Committee

Ladies and Gentlemen:

We are requesting your opinion on the following questions:

1. Does TEX. REV. CIV. STAT. ANN. art. 6795b-1, § 4 (Vernon Supp. 1994) (the "Act") permit the Commissioners Court of Harris County to authorize and issue bonds under the Act without complying with the requirements of the Texas Open Meetings Act, TEX. GOV'T CODE ANN. §§ 551.001 - 551.146 (Vernon 1994)?
2. Does the Act permit Harris County to incur costs in the issuance of the bonds (*i.e.*, printing of the bond certificates) or award contracts (*i.e.*, providing a line of credit, paying agent services and other banking services) without complying with the bid requirements set forth in the County Purchasing Act, TEX. LOCAL GOV'T CODE ANN. §§ 262.001 - 262.035 (Vernon 1988 & Vernon Supp. 1994)?
3. May the County delegate the awarding of a printing contract for the printing of bond documents to a third party (*i.e.*, bond counsel, financial advisor, or underwriters' counsel) under the County Purchasing Act?

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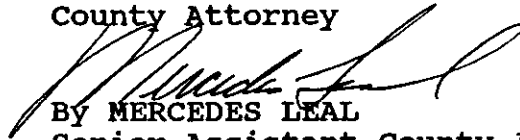
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Please supply us with your opinion on the questions presented. Our memorandum brief is enclosed. If we can provide you with any additional information, please do not hesitate to contact us.

Sincerely,

MIKE DRISCOLL
County Attorney

A handwritten signature in dark ink, appearing to read "Mercedes Leal", is written over the typed name.

By MERCEDES LEAL
Senior Assistant County Attorney

Encl.

MEMORANDUM BRIEF

An Order adopted by the Harris County Commissioners Court on September 22, 1983, authorized the creation of the Harris County Toll Road Authority and the construction of toll roads in Harris County pursuant to TEX. REV. CIV. STAT. ANN. art. 6795b-1, as amended (hereinafter referred to as "the Act"). See Driscoll v. Harris County Commissioners Court, 688 S.W.2d 569 (Tex. App. -- Houston [14th Dist.] 1985, writ ref.d n.r.e.). In that same Order, the members of the Commissioners Court were designated the operating board of the authority. In exercising its authority to carry out projects under the Act, the Commissioners Court is authorized to issue tax bonds, revenue bonds, or combination tax and revenue bonds to pay the cost of such projects.

Section 4 of the Act, TEX. REV. CIV. STAT. ANN. (Vernon Supp. 1994) states, in part, "[t]he bonds issued hereunder may be authorized by resolution or order at one time or from time to time." Section 4 further provides:

Such bonds may be authorized and issued without any proceedings or the happening of any conditions or things or the publication of any proceedings or notices other than those specifically specified and required by this Act, and may be authorized and issued without regard to the requirements, restrictions, or procedural provisions contained in any other law. (Emphasis added).

This language has raised the following questions:

1. Does TEX. REV. CIV. STAT. ANN. art. 6795b-1, § 4 (Vernon Supp. 1994) (the "Act") permit the Commissioners Court of Harris County to authorize and issue bonds under the Act without complying with the requirements of the Texas Open Meetings Act, TEX. GOV'T CODE ANN. §§ 551.001 - 551.146 (Vernon 1994)?
2. Does the Act permit the County to incur costs in the issuance of the bonds (*i.e.*, printing the bond certificates) or award contracts (*i.e.*, providing a line of credit, paying agent services and other banking services) without complying with the bid requirements set forth in the County Purchasing Act, TEX. LOCAL GOV'T CODE ANN. §§ 262.001 - 262.035 (Vernon 1988 & Vernon Supp. 1994)?
3. May the County delegate the awarding of a printing contract for the printing of bond documents (*i.e.*, notice of sale, preliminary official statement, official

statement) to a third party (i.e., bond counsel, financial advisor, or underwriters' counsel) under the County Purchasing Act?

The language "[s]uch bonds . . . may be authorized and issued without regard to the requirements, restrictions, or procedural provisions contained in any other law" set out section 4 of the Act has been interpreted by some as meaning that any acts taken by the Commissioners Court in connection with the authorization and issuance of such bonds is exempted from all other laws, including application of the Open Meetings and County Purchasing Acts. The Open Meetings Act requires that "[e]very regular, special, or called meeting of a governmental body shall be open to the public, except as provided by this chapter." TEX. GOV'T CODE. ANN. § 551.002 (Vernon 1994). The County Purchasing Act requires that "[b]efore a county may purchase one or more items under a contract that will require an expenditure exceeding \$15,000, the commissioners court of the county must comply with the competitive bidding or competitive proposal procedures prescribed by this subchapter" unless, of course, the contract is for the purchase of items which are exempt from competitive bidding. TEX. LOCAL GOV'T CODE ANN. §§ 262.023 & 262.024 (Vernon Supp. 1994).

For reasons discussed herein, we conclude that this language does not exempt the Commissioners Court from the requirements set out in either the Open Meetings or the County Purchasing Acts. This language instead serves to exempt the authorization and issuance of these particular bonds from the requirements, restrictions and procedural requirements which may be set out in any other law affecting a county's issuance of bonds such as, Title 22, TEX. REV. CIV. STAT. arts. 701 - 801 (Vernon 1964 & Vernon Supp. 1994) or TEX. REV. CIV. STAT. ANN. art. 6702-1, § 4.411 (Vernon Supp. 1994). A review of the provisions set out in Title 22 dealing with the issuance of county and municipal bonds clarifies that the procedural requirements and other restrictions referenced in section 4 of the Act have nothing to do with the Open Meetings or County Purchasing Acts. Instead, they address such things as whether an election or the levying of a tax is required to issue the bonds, and how publication of notice for issuance of the bonds should be made.

Initially, we note that repeal by implication is not favored and that old and new statutes will each be construed so as to give effect to both statutes, if possible. See Dial v. State, 658 S.W.2d 823, 826 (Tex. App.--Austin 1983, no writ). In this case, strong public policy considerations clearly favor a construction which upholds the application of the Open Meetings and County Purchasing Acts to actions taken by the Commissioners Court under the Act. For example, in Lohec v. Galveston County Commissioner's Court, 841 S.W.2d 361 (Tex. 1992) the Texas Supreme Court held that a county beach park board was not intended to be an independent autonomous

entity exempt from meaningful oversight by a county. The Court reasoned:

Public policy strongly favors protecting taxpayers with strict oversight of governmental financial transactions. . . . It would be contrary to public policy to allow these boards to operate with total autonomy and to avoid the public posting, bidding, purchasing and auditing procedures imposed on counties unless explicitly excluded, as in the case of 'city-county hospital[s] or other joint undertaking[s] of the city and county" (Emphasis added).

Lohec, 841 S.W.2d at 365.

It appears inconsistent and absurd to say the Legislature in this one isolated case involving governmental action intended to override the requirements set out in either the Open Meetings or County Purchasing Acts. If the Legislature had truly intended to exempt the authorization and issuance of these bonds from the requirements of these two statutes, the Legislature would have used explicit language to accomplish such a result given that public policy strongly favors open government, public notice to taxpayers regarding the expenditure of public monies, and stringent adherence to rules affecting financial transactions by governmental bodies.

In applying the provisions of the County Purchasing Act, unless an item costing more than \$15,000.00 is specifically exempted from the bidding requirements under section 262.024, then the County must take bids or proposals to acquire that item. The fact that criminal penalties may be imposed on an officer or employee who intentionally or knowingly violates the County Purchasing Act and that the officer or employee may also be removed from his/her office or employment reflects the legislature's intent to impose reasonable controls on the acquisition of services, equipment, and goods by counties. In addition, legislative intent in enacting the Open Meetings Act has clearly been to apply its provisions liberally to all forms of governmental bodies, as well as acts taken by them in carrying out their various responsibilities and duties. For example, in Op. Tex. Att'y Gen. No. H-1269 (1978), Attorney General Hill addressed whether the Open Meetings Act applies to proceedings under the Administrative Procedure Act. Attorney General Hill stated:

We find no support for the proposition that the Administrative Procedure Act was in any way designed to permit state agencies to avoid the requirements of the Open Meetings Act. The Open Meetings Act is designed for the purpose 'of assuring that the public has the opportunity to

be informed concerning the transactions of public business' and should be liberally construed to effect that purpose. . . . We believe the Open Meetings Act requires deliberations to be held in public unless specifically exempted in section 2 of the Act.

Op. Tex. Att'y Gen. No. H-1269 (1978).

It is also a uniform rule that in order to transact county business a county commissioners must meet as a court and transact county business in open session. See Swaim v. Montgomery, 154 S.W.2d 695 (Tex. Civ. App. - Amarillo 1941, writ ref'd w.o.m.); Tarrant County v. Smith, 81 S.W.2d 537 (Tex. Civ. App. - Ft. Worth 1935, writ ref'd). The Court in both of the cases cited noted:

Such requirement is not formal. It is substantial, both that the members may have the benefit of the knowledge and opinions of the other members, as well as that the public may know what and where its affairs are being transacted. Const. art. 1, § 13 (Vernon's Ann. St.)

Swaim, 154 S.W.2d at 697; Tarrant County, 81 S.W.2d at 538. Given that a county commissioners court must act as a unit and in open session, it would be illogical to construe section 4 of the Act as meaning that the authorization and issuance of toll road bonds is exempted from the Open Meetings Act. See 67 Tex. Jur.3d Statutes § 89 (1989).

Assuming that the Commissioners Court is not exempt from the requirements of the County Purchasing Act, we seek your opinion on whether the Commissioners Court may delegate the awarding of a printing contract for the printing of the bond certificates to a third party, such as bond counsel, the County's financial advisor or underwriters' counsel. TEX. LOCAL GOV'T CODE ANN. § 262.027(a) (Vernon Supp. 1994) provides:

(a) The officer in charge of opening the bids shall present them to the commissioners court in session. Except as provided by Subsection (e), the court shall:

(1) award the contract to the responsible bidder who submits the lowest and best bid; or

(2) reject all bids and publish a new notice. (Emphasis added).

In Harris County, the law expressly places responsibility for receiving bids or proposals for items requiring an expenditure exceeding \$15,000.00 on the County Purchasing Agent. See TEX. LOCAL GOV'T CODE ANN. § 262.0115 (Vernon Supp. 1994). Once such bids or proposals are received by the County, the Commissioners Court is then required to award the contract to the responsible bidder who submits the "lowest and best bid." It is a well-settled principle that "[w]hen the law imposes upon an officer the performance of certain acts as a part of his official duties, the commissioners' courts of the different counties are without authority to contract with any other person to perform those services, or to in any manner transfer that official duty to any other person than that named in the law." Stringer v. Franklin County, 123 S.W. 1168 (Tex. Civ. App. 1909, no writ).

The responsibilities placed on the County Purchasing Agent and the Commissioners Court by the County Purchasing Act are certainly included within their official duties. More importantly, the determination by the Commissioners Court of which bid is the "lowest and best bid" involves the exercise of discretion by the Commissioners Court, the exercise of which cannot be delegated to a third party. See Guerra v. Rodriguez, 239 S.W.2d 915 (Tex. Civ. App. --San Antonio 1951, no writ). For these reasons, we have determined that the Commissioners Court is not authorized to delegate the awarding of a printing contract to a third party. Therefore, if the costs associated with printing the bond certificates exceeds \$15,000.00, the County must adhere to the competitive bidding requirements set out in the County Purchasing Act and only the Commissioners Court can determine which responsible bidder has submitted the lowest and best bid.